1993

# Robert A. Knibbe v. Phil Himmelberger : Brief of Appellant

Utah Court of Appeals


Jan Graham; Utah Attorney General; Thom D. Roberts; Assistant Attorney General; Attorneys for Respondent-Appellant.
Robert M. McRae; McRae & DeLand; Attorney for Petitioner-Appellee.

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IN THE UTAH COURT OF APPEALS

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| ROBERT A. KNIBBE,<br><br>Petitioner-Appellee,<br><br>v.<br><br>PHIL HIMMELBERGER, Bureau Chief, Drivers License Services, State of Utah, Department of Public Safety,<br><br>Respondent-Appellant. | **BRIEF OF THE APPELLANT**<br><br>Case No. 930041-CA<br><br>Priority No. 14\15 |

APPEAL FROM THE FINAL JUDGMENT OF THE EIGHTH JUDICIAL DISTRICT, UINTAH COUNTY, STATE OF UTAH, THE HONORABLE JOHN A. ANDERSON, PRESIDING.

JAN GRAHAM (1231)
Utah Attorney General
THOM D. ROBERTS (2773)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1015
Attorneys for Respondent-Appellant



Robert M. McRae, Esq.
Attorney for Petitioner-Appellee
109 East 100 North
Vernal, Utah 84078

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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1015
Attorneys for Respondent-Appellant

Robert M. McRae, Esq.
Attorney for Petitioner-Appellee
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# BRIEF OF THE APPELLANT

## JURISDICTION

Jurisdiction is in the Court of Appeals based upon Utah Code Ann. § 78-2A-3(2)(a) (1992).

## ISSUES PRESENTED AND STANDARDS OF REVIEW

A. Is Petitioner entitled to seek review of an Administrative Order of the Driver's License Division by way of an Extraordinary Writ under Rule 65B, Utah Rules of Civil Procedure?

This determination is a question of law and the Court should accord no deference to the district court's judgment but should review it under a "correctness" standard. State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991); Rollins v. Petersen, 813 P.2d 1156, 1159 (Utah 1991); Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990).

B. Did the trial court lack jurisdiction to hear Petitioner's claim based on his failure to exhaust administrative remedies?

This determination is a question of law and this Court should accord no deference to the district court's judgment which was reviewed under a "correctness" standard. State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991); Rollins v. Petersen, 813 P.2d 1156, 1159 (Utah 1991); Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990).

## DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Attached in the Addendum are the following determinative statutes and rules: Utah Code Ann. §§ 41-2-131; §§ 63-46b-14, 15, and 18; § 78-3-4; and Rule 65B, Utah Rules of Civil Procedure.

## STATEMENT OF THE CASE

This appeal is from the final judgment of the Eighth Judicial District Court, Uintah County, granting relief to the

Petitioner. Petitioner filed this action for relief under Rule 65B, Utah Rules of Civil Procedure, Extraordinary Relief, seeking a reversal of the administrative suspension of his driving privileges by the Respondent.

Petitioner's driving privileges were suspended for 90 days following an informal adjudicative proceeding before the Driver's License Division of the Department of Public Safety (the "Division"), the Respondent. The suspension was based upon the Petitioner having been in the actual physical control of a motor vehicle with a breath alcohol content above .08% Utah Code Ann. § 41-2-130 (Supp. 1992).

Rather than seeking judicial review of that administrative order of suspension in accordance with Utah Code Ann. § 41-2-131 (Supp. 1992) and Utah Code Ann. §§ 63-46b-14 and 15 (Supp. 1992), Petitioner sought relief by way of a petition for an Extraordinary Writ, Rule 65B, Utah Rules of Civil Procedure. See Petition for Extraordinary Relief, R. at 2, Addendum at 7. The Respondent Division filed a Motion to Dismiss the Petition and a Motion for Judgment on the Pleadings, which were denied. The trial court then granted relief to the Petitioner pursuant to Rule 65B, R. at 50, Addendum at 6. This appeals followed.

## SUMMARY OF ARGUMENT

### POINT I

Rule 65B, Utah Rules of Civil Procedure, Extraordinary Relief, is only available when there is no other plain, speedy and adequate remedy available to a Petitioner. Here, the Driver's License Division and the Utah Administrative Procedures Acts allow for judicial review of the order. Such constitutes a plain, speedy and adequate remedy at law therefore a proceeding under Rule 65B for an Extraordinary Writ is not available.

### POINT II

Parties may obtain judicial review of administrative agency actions only after exhausting and availing themselves of all administrative remedies. Petitioner failed to seek his administrative remedy of an appeal to the District Court and that constitutes a failure to exhaust his administrative remedies. Therefore, the court lacked jurisdiction and authority to hear Petitioner's claim.

## ARGUMENT

**POINT 1. PETITIONER IS NOT ENTITLED TO OBTAIN REVIEW OF THE ADMINISTRATIVE ORDER OF THE RESPONDENT BY WAY OF PETITION UNDER RULE 65B, UTAH RULES OF CIVIL PROCEDURE.**

Petitioner brought this action for Extraordinary Relief under the provisions of Rule 65B, Utah Rules of Civil Procedure. It is Respondent's position that Petitioner is limited to

proceeding by way of judicial review of an administrative order pursuant to Utah Code Ann. § 41-2-131 (1988) and §§ 63-4a-15, -17, and -18 (Supp. 1992).

Petitioner was arrested on July 3, 1992, in Vernal and charged with driving under the influence. On August 16, 1992, pursuant to the Petitioner's request, a hearing was duly held before the Respondent Division pursuant to Utah Code Ann. § 41-2-130 (Supp. 1992) on whether the Respondent should suspend the driving privileges of the Petitioner. As a result of and based upon that hearing, the Respondent issued an Order suspending the driving privileges of the Petitioner for a period of 90 days. Petitioner initiated these proceedings to review and reverse the actions of the Respondent in suspending the driving privileges of the Petitioner and to reinstate the Petitioner's driving privileges. See Petition for Extraordinary Relief and documents filed therewith, R. at 2, Addendum at 7.

Proceedings under Rule 65B, Extraordinary Relief, Utah Rules of Civil Procedure, are only available in certain specified circumstances. Concerning the availability of the remedy, the Rule provides:

> Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of

> the grounds set forth in paragraph (e) (involving the wrongful use of judicial authority and the failure to exercise such authority)[.]

Petitioner has a plain, speedy and adequate remedy under the Driver's License statute as well as the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1, et seq. (Supp. 1992), and Rule 65B by its own terms is not available.

Proceedings were held at the administrative level to suspend the driving privileges of the Petitioner pursuant to Utah Code Ann. § 41-2-130 (Supp. 1992). Concerning review of that proceeding, Utah Code Ann. § 41-2-131 (1988) provides:

> Any person denied a license or whose license has been cancelled, suspended, or revoked by the department may seek judicial review of the department's order.

The administrative proceedings before the Driver's License Division concerning Petitioner's drivers license were subject to the Administrative Procedures Act of Utah, see Utah Code Ann. § 63-46b-1 and Brinkerhoff v. Schwendiman, 790 P.2d 587 (Ut. App. 1990). All hearings before the Division have been designated as informal adjudicated proceedings. See Utah Code Admin. Proc. R.708-17. Judicial review of informal adjudicative proceedings is provided for in the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-14, and the Act provides that judicial review shall be in the district courts by way of trial de novo, § 63-

46b-15(1). See also Brinkerhoff v. Schwendiman, supra.

The Utah statutory procedures with regard to driver's license matters as well as administrative procedures both allow for review and provide a procedure for review. As such, they constitute the availability of a remedy that is "plain, speedy and adequate" and therefore relief under Rule 65B is not available.

The Utah Supreme Court's interpretation of Rule 65B reaches a similar conclusion. In Merryihew v. Salt Lake County Planning, 659 P.2d 1065 (Utah 1980), Plaintiff sought to reinstate a zoning ordinance and a building permit issued pursuant thereto. Rather than appealing pursuant to Utah Code Ann. § 17-27-16, Plaintiff sought relief under Rule 65B, Utah Rules of Civil Procedure. The Court disallowed any relief because the Plaintiff sought his relief under Rule 65B rather than the statutory appeal procedure:

> By ignoring a plain, speedy, and adequate remedy at law, the plaintiffs placed themselves out of reach of the extraordinary writ of mandamus. A writ of mandamus is not a substitute for and cannot be used in civil proceedings to serve the purpose of an appeal, certiorari, or writ of error.

659 P.2d at 1067, quoting Crist v. Mapleton City, 497 P.2d 633, 634 (1972).

Since Petitioner could obtain judicial review of the

administrative decision suspending his driving privileges, and had the ability under the Administrative Procedures Act to obtain a stay of that order pending a hearing, see Utah Code Ann. § 63-46b-18 (1988), Petitioner had a plain, speedy and adequate remedy to review the administrative decision of the Respondent. Therefore, proceedings for relief by way of Rule 65B, Utah Rules of Civil Procedure, are not available to him, and his petition should have been dismissed. This Court should reverse the lower Court's decision and remand with directions to dismiss the petition.

**POINT II. THE TRIAL COURT LACKS JURISDICTION TO HEAR PETITIONER'S CLAIM BASED UPON HIS FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES.**

Utah law provides a procedure for review of the order of the Respondent suspending the driving privileges of the Petitioner in this case. That procedure is the filing of an action in district court seeking judicial review by way of trial de novo of the administrative decision of the Petitioner. See Utah Code Ann. § 41-2-131 (Supp. 1992); Brinkerhoff v. Schwendiman, supra. District courts may only review agency actions after the party has "exhaust[ed] all administrative remedies available", including agency and judicial review. Utah Code Ann. § 63-46b-14(2). See also Utah Code Ann. § 78-3-4 (5) (Supp. 1992). Petitioner failed to seek judicial review of the

administrative order, thereby not exhausting his administrative remedies, and the trial court therefore lacked jurisdiction over his claimed review.

Also, Rule 65B, Utah Rules of Civil Procedure, has a similar exhaustion of administrative remedies requirement. In Merryihew v. Salt Lake County Planning, supra, the Court dismissed the claim for judicial review under Rule 65B for the plaintiff's failure to seek administrative and judicial review of the decision of the planning commission, stating, at 659 P.2d 1067:

> Consequently, we reaffirm that the general proposition of law that parties must exhaust administrative remedies as a prerequisite to seeking judicial review is applicable to claims relating to denial of a building permit . . .
>
> We do not reach the issue of the validity of the zoning ordinance because we hold that plaintiff's failure to exhaust his administrative remedies prevents him from seeking relief at this time from the courts.

This requirement under Rule 65B of exhaustion of administrative remedies is really the other side of the requirement under the extraordinary writ procedures that there is "no other plain, speedy and adequate remedy . . . available," Rule 65B(a) -- if there are administrative remedies and procedures for review of the administrative decision, as allowed or mandated by statute or rule, then there is an adequate remedy

available. Extraordinary relief under Rule 65B is limited to those situations where there is no other remedy available. "An extraordinary writ is not a proceeding for general review, and cannot be used as such." Anderson v. Baker, 296 P.2d 283 (Utah 1956).

The jurisdiction and authority of the trial court to hear petitioner's claims - either as judicial review of an administrative order or as a proceeding on an extraordinary writ - is limited to instances where Petitioner has exhausted all of his administrative remedies. Since he failed to do so, the trial court lacked jurisdiction and authority and this Court should reverse the Order and remand the case with direction to dismiss the Petition.

## CONCLUSION

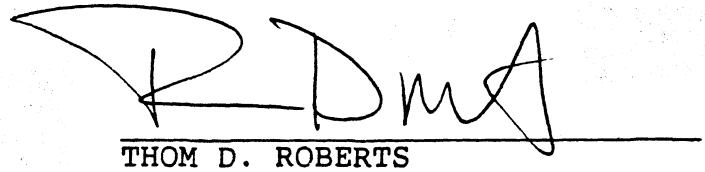
Since both the driver license statutes and the Administrative Procedures Act allow for judicial review of the administrative decision of the Respondent, there is a plain, speedy and adequate remedy available to the Petitioner for review of the administrative decision. That remedy precludes relief under Rule 65B, Utah Rules of Civil Procedure. In addition, Petitioner failed to exhaust his administrative remedies and failed to comply with the procedures for review of administrative decision and the trial court therefore lacked jurisdiction and

authority to hear his claim. The trial court should have dismissed Petitioner's claim and denied him any relief.

It is respectfully submitted that this Court should reverse the decision of the trial court granting relief to the Petitioner under Rule 65B, Utah Rules of Civil Procedure, should hold that review of the administrative decision of the Respondent is only available pursuant to a petition for judicial review and trial de novo, and remand this matter to district court with directions to dismiss the Petition.

DATED this 31ST day of March, 1992.

JAN GRAHAM
Attorney General



THOM D. ROBERTS
Assistant Attorney General
Governmental Affairs Division
Attorney for Defendant-
Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing **BRIEF OF THE APPELLANT**, this 31ST day of March, 1992, to the following:

ROBERT M. MCRAE
MCRAE & DELAND
209 East 100 North
Vernal, Utah 84078

**ADDENDUM**

1. UTAH CODE ANNOTATED § 41-2-131 (1988)

2. UTAH CODE ANNOTATED § 63-46b-14 (1989)

3. UTAH CODE ANNOTATED § 63-46b-15 (Supp. 1992)

4. UTAH CODE ANNOTATED § 63-46b-18 (1988)

5. UTAH CODE ANNOTATED § 78-3-4 (1992)

6 R.65B, UTAH RULES OF CIVIL PROCEDURE

7. PETITION FOR EXTRAORDINARY RELIEF
   RULE 65B, U.R.C.P.

8. ORDER ON PETITION FOR EXTRAORDINARY RELIEF
   RULE 65B U.R.C.P.

**41-2-131. Judicial review of license cancellation, revocation or suspension.**

(1) Any person denied a license or whose license has been cancelled, suspended, or revoked by the department may seek judicial review of the department's order.

(2) Venue for judicial review of informal adjudicative proceedings is in the district court in the county where the person resides. Persons not residing in the state shall file in Salt Lake County or the county where the offense occurred which resulted in the cancellation, suspension, or revocation. 1987 (1st S.S.)

**63-46b-14. Judicial review — Exhaustion of administrative remedies.**

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter. 1988

**63-46b-15. Judicial review — Informal adjudicative proceedings.**

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1990

**63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.**

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

(a) the agency violated its own rules in denying the stay; or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances. 1987

**78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when court does not exist.**

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) Under the general supervision of the presiding officer of the Judicial Council and subject to policies established by the Judicial Council, cases filed in the district court, which are also within the concurrent jurisdiction of the circuit court, may be transferred to the circuit court by the presiding judge of the district court in multiple judge districts or the district court judge in single judge districts. The transfer of these cases may be made upon the court's own motion or upon the motion of either party for adjudication. When an order is made transferring a case, the court shall transmit the pleadings and papers to the circuit court to which the case is transferred. The circuit court has the same jurisdiction as if the case had been originally commenced in the circuit court and any appeals from final judgments shall be to the Court of Appeals.

(4) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.

(5) The district court has jurisdiction to review agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings.

(6) When a circuit court is given original or appellate jurisdiction of a matter and no such court exists in the county of proper venue, the district court shall have jurisdiction. Notwithstanding Section 78-3-14.5, criminal fines and forfeitures collected in such cases shall be distributed as if filed in the circuit court.

1992

**Rule 65B. Extraordinary relief.**

(a) **Availability of remedy.** Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful imprisonment), paragraph (c) (involving other types of wrongful restraint on personal liberty), paragraph (d) (involving the wrongful use of public or corporate authority) or paragraph (e) (involving the wrongful use of judicial authority and the failure to exercise such authority). There shall be no special form of writ The procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) **Wrongful imprisonment.**

(1) **Scope.** Any person committed by a court to imprisonment in a state prison, other correctional facility or county jail who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement.

(2) **Commencement.** The proceeding shall be commenced by filing a petition, together with a copy thereof, with the clerk of the court in which the commitment leading to confinement was issued, except that the court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(3) **Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to the legality of the commitment. Additional claims relating to the legality of the commitment may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(i) the place where the petitioner is restrained;

(ii) the name of the court by which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(iii) in plain and concise terms, all of the facts on the basis of which the petitioner claims a substantial violation of rights as the result of the commitment;

(iv) whether or not the judgment of conviction or the commitment for violation of probation or parole has been reviewed on appeal, and, if so, the number and caption or title of the appellate proceeding and the results of the review;

(v) whether the legality of the commitment has already been adjudicated in any prior post-conviction or other civil proceeding, and if so the reasons for the denial of relief in the prior proceeding.

(4) **Attachments to the petition.** The petitioner shall attach to the petition affidavits, copies of records or other evidence available to the petitioner in support of the allegations. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the commitment, and a copy of all orders and memoranda of the court. If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.

(5) **Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(6) **Assignment by the presiding judge.** On the filing of the petition, the clerk shall promptly deliver it to the presiding judge of the court in which it is filed. The presiding judge shall if possible assign the proceeding to the judge who issued the commitment.

(7) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the issues presented in the petition have already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(8) **Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition is not frivolous on its face, the court shall designate the portions of the petition that are not frivolous and direct the clerk to serve a copy of the petition and a copy of any memorandum by mail upon the attorney general and the county attorney.

(9) **Responsive pleading.** Within twenty days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the attorney general and county attorney, or within such other period of time as the court may allow, the attorney general or county attorney shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within twenty days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(10) **Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. Upon

motion for good cause, the court may grant leave to either party to take discovery or to extend the date for the hearing. Prior to the hearing, the court may order either the petitioner or the state or county to obtain any relevant transcript or court records. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding.

(11) **Orders.** If the court rules in favor of the petitioner, it shall enter an appropriate order with respect to the validity of the challenged commitment and with respect to rearraignment, retrial, resentencing, custody, bail or discharge. The court shall enter findings of fact and conclusions of law, as appropriate, following any evidentiary hearing or any hearing on a dispositive motion. Upon application of the attorney general or the county attorney, or upon its own motion, the court may stay release of the petitioner pending appeal of its order.

(12) **Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is unable to pay the costs of the proceeding, the petitioner may proceed upon an affidavit of impecuniosity, in which event the court may direct that the costs be paid by the county in which the complainant was originally charged.

(13) **Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

(c) **Other wrongful restraints on personal liberty.**

(1) **Scope.** Except for instances governed by paragraph (b) of this rule, this paragraph (c) shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) **Commencement.** The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) **Contents of the petition and attachments.** The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(5) **Issuance and contents of the hearing order.** If the petition is not dismissed as being frivolous on its face, the court shall issue a hearing order directing the respondent to appear before the court at a specified time for a hearing on the legality of the restraint. The court shall direct the clerk to serve a copy of the petition and the hearing order by mail upon the respondent. In the hearing order, the court may direct the respondent to bring before it the person alleged to be restrained. The court may direct the respondent to file an answer to the petition within a period of time specified in the hearing order. If the petitioner waives the right to be present at the hearing, the hearing order shall be modified accordingly.

(6) **Temporary relief.** If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(7) **Alternative service of the hearing order.** If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(8) **Avoidance of service by respondent.** If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(9) **Hearing and subsequent proceedings.** At the time specified in the hearing order for the hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. If the hearing order requires an answer to the petition, the respondent shall file an answer within the time prescribed in the hearing order. The answer shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

**(d) Wrongful use of or failure to exercise public authority.**

**(1) Who may petition the court; security.** The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph (d). Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph (d) may petition the court under this paragraph (d) if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

**(2) Grounds for relief.** Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

**(3) Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

**(e) Wrongful use of judicial authority or failure to comply with duty.**

**(1) Who may petition.** A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph (e) may petition the court for relief.

**(2) Grounds for relief.** Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused *its discretion; (B) where an inferior court, admin*istrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; or (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled.

**(3) Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

**(4) Scope of review.** Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

(Amended effective September 1, 1991.)

ROBERT M. McRAE, #2217
McRAE & DeLAND
Attorney for Defendant
209 East 100 North
Vernal, UT 84078
(801) 789-1666

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

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| ROBERT A. KNIBBE, | : | |
| Petitioner, | : | PETITION FOR EXTRAORDINARY RELIEF |
| | : | Rule 65B, U.R.C.P. |
| vs. | : | Case No. |
| PHIL HIMMELBERGER, Bureau Chief, Drivers License Services, State of Utah, Department of Public Safety, | : | Judge |
| Respondent. | : | |

Pursuant to Rule 65B(d)(e)(1)(2), Utah Rules of Civil Procedure, Robert A. Knibbe petitions this Court for an extraordinary writ prohibiting Respondent from exercising by and through his administrative hearing officers any acts terminating petitioner's right to operate a motor vehicle in this state by virtue of his arrest July 3, 1992, in Vernal, Utah for an alleged offense of violating §41-6-44, et seq. U.C.A. as amended. In support of this petition, Petitioner alleges as follows:

1. Respondent is the duly appointed bureau chief of Driver's License Services for the Department of Public Safety, State of Utah.

2. In that capacity respondent causes to be issued notices of hearing issued to persons who are arrested within this State for allegedly violating §41-6-44, et. seq. U.C.A. as amended (DUI).

3. Respondent either personally appoints or assists in the appointment of administrative hearing officers such as C. Niels Nielsen, who conduct hearings pursuant to §41-6-44.10 U.C.A. as amended, and §44-2-130, U.C.A., 1992, to determine in substance (a) whether there was probable cause to stop and detain petitioner's motor vehicle by a properly appointed peace officer within this State; (b) whether at the time of stop and detention the peace officer had reasonable grounds to believe that petitioner was under the influence of alcohol while driving a motor vehicle within this State and (c) whether or not petitioner, by a valid blood alcohol chemical test of arresting officer's choice, had a blood alcohol content of .08% or greater from a method of testing approved by the Commissioner of Public Safety of this State.

4. On August 26, 1992, at the appointed hour of 1:30 p.m. in Vernal, Utah, the said C. Niels Nielson, as a hearing

officer for the Department of Public Safety purported to conduct a hearing as contemplated aforesaid in these pleadings as an administrative hearing officer for Respondent in his official capacity.

5. Said hearing officer abused his discretion, exceeded his jurisdiction as an impartial hearing officer and exercised judicial functions taking judicial notice of facts which cannot be judicially noticed. Said hearing officer did not require any custodian affidavit from Sergeant Chris Korning or his successor authenticating that routine tests within 40 days of each other had been conducted by certified personnel of the Department of Public Safety to test and maintain the intoxilyzer located at the Uintah County Jail. The said hearing officer found and determined that without any documentation as to the maintenance, reliability and substantive evidence being offered, that said intoxilyzer "by a preponderance of the evidence" was properly operating on July 19, 1992, when a test was administered to Petitioner after his arrest. The hearing officer took judicial notice that if the machine was tested on July 15, 1992, that it was operating correctly on July 19, 1992, without further evidence of testing on a before and after examination of the machine as contemplated by the breath testing regulations enacted by the Public Safety Commissioner. Further the affidavit of the

alleged certifying officer is self serving on its face as he creates his own certifiation by his own affidavit which was not contemoraneously notorized as required in Murray City v. Hall, 663 P.2d 1314 (Utah 1983) the same having been notorized July 16, 1992, in Weber County, Utah.

6. In so ruling, the hearing officer, in abusing his discretion made a finding as to the accuracy of said machine in delivering a test result on July 19, 1992, showing a chemical analysis of Petitioner's breath equated to Petitioner's blood alcohol content, giving a result of .08 or greater.

7. The said hearing officer routinely acts as an advocate for arresting officers and for the Department within the Department of Public Safety which respondent is in charge of in his official duties for the State of Utah and said hearing officer does not act as a neutral, unbiased administrative officer.

8. No other speedy or accurate remedy exists to permit the forthwith review of the record of the hearing in this case.

9. By virtue of the loss of Petitioner's driving privileges he will be irreparably harmed in continuing to perform his job duties.

10. The provisions of §41-6-44.3 U.C.A. as amended, are unconstitutional in that they create an non-permissible evidentiary presumption.

WHEREFORE, Petitioner requests the Court set this matter down for hearing, issue an Order requiring respondent to transcribe the hearing proceedings and certify the transcribed proceedings along with the original tape recording to this court for review. Petitioner further requests an order of this Court finding Respondent and his administrative hearing officers and more particularly C. Niels Nielson as being guilty of abusing his discretion and abusing his powers in not being neutral and conducting hearing such as the one complained of herein, in and unbiased and unarbitrary manner.

DATED this 3 day of September, 1992.

McRAE & DeLAND

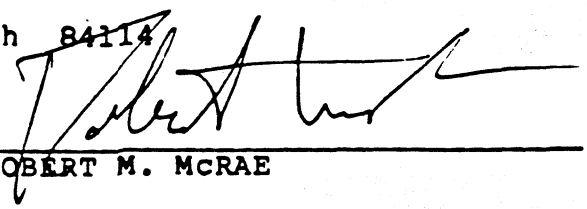
ROBERT M. McRAE
Attorney for Petitioner

CERTIFICATE OF MAILING

I do hereby certify that I mailed, certified postage prepaid, a true and correct copy of the foregoing to the following on this 3 day of September, 1992:

Phil Himmelberger
Respondent
Drivers License Services
4501 South 2700 West
Salt Lake City, Utah 84119

Tom Roberts
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114



ROBERT M. McRAE

ROBERT M. McRAE, #2217
McRAE & DeLAND
Attorney for Defendant
209 East 100 North
Vernal, UT 84078
(801) 789-1666

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

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| | | |
|---|---|---|
| ROBERT A. KNIBBE,<br><br>Petitioner,<br><br>vs.<br><br>PHIL HIMMELBERGER, Bureau Chief, Drivers License Services, State of Utah, Department of Public Safety,<br><br>Respondent. | : | ORDER ON PETITION FOR EXTRAORDINARY RELIEF Rule 65B, U.R.C.P.<br><br>Case No. 920800216CV<br><br>Judge John A. Anderson |

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The above entitled case came on for hearing on October 21, 1992 before the Honorable John R. Anderson on Petitioner's Petition for Extraordinary Relief pursuant to 65B, Utah Rules of Civil Procedure. Petitioner was present with counsel, Robert M. McRae. None of the respondents or counsel were present. The Court having before it Respondent's Motion to Dismiss on the grounds that Petitioner had failed to exhaust his administrative remedies and the Court finding that this procedure sought by the Petitioner is a valid alternative method of appealing Respondent's arbitrary and capricious acts, IT IS HEREBY ORDERED:

1. Respondent's have made a general appearance in filing their Motion to Dismiss.

2. Said Motion is denied for the reasons stated above.

3. Petitioner's Petition is hereby ordered granted and Petitioner's driving privileges are hereby ordered reinstated in the State of Utah.

DATED this 3 day of Nov. October, 1992.

BY THE COURT:

JOHN R. ANDERSON
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that pursuant to Rule 4-504, Code of Judicial Administration, I mailed, postage prepaid, a copy of the above Order on Petition for Extraordinary Relief to Thom D. Roberts, Assistant Attorney General, Attorney for Respondents, 236 State Capitol Building, Salt Lake City, UT 84114. In the event no formal objection to the form of this order is received within five days pursuant to above Rule, the Original of this order will be tendered to this court for signature.

DATED this 22 day of Oct 1992.

ROBERT M. McRAE